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In the Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.,

Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE
and INTERNATIONAL OLYMPIC COMMITTEE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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I. THE INSTANT CASE REMAINS A DISPUTE ABOUT A SMALL NON-PROFIT CORPORATION'S POLITICAL AND EXPRESSIVE USES OF AN ANCIENT GENERIC TERM, IN THE DISTINCTIVE CONTEXT OF THE PROPOSED "GAY OLYMPIC GAMES".

In their brief on the merits, respondents USOC et al. (below, "USOC") seek to suggest that the word "Olympic" was used by petitioners SFA&A and Dr. Waddell (below, "SFA&A") in a manner that disassociated it from the word "Gay", and from the context of the human and civil rights movement for persons of minority sexual orientations, of which the "Gay Olympic Games" were intended and designed to be a part. (Brief for Respondents (below, "R.Br.") 2- 3, 11).

This effort by USOC to sever the philosophical and linguistic links between "Olympic" and "Gay" in this case, so as to depict SFA&A as just another crass and profit-crazed[1] commercial imitator of the Olympics, must fail on the record

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[1]Going outside the record to cite newspaper articles, USOC argues that SFA&A's budget for the 1986 Gay Games was 'magnitudes larger' than the $400,000. that the Gay Games cost SFA&A to present in 1982. (R.Br. 8 n.7) Presumably, this improper departure from the record by USOC is gauged to persuade this Court that SFA&A is a financial gargantua in disguise, whose use of "Olympic" to identify and promote its proposed "Gay Olympic Games" actually could pose a genuine threat to USOC's economic stability and fund raising capacities. Because USOC has gone outside the record to create a picture of SFA&A as a sizeable and financially comfortable organization that might menace USOC's fund-raising by use of "Olympic", and because that picture is both grossly false as to SFA&A, and severely slanted against this Court's recognition of USOC's own real economic situation, SFA&A is obliged to reply, from outside the record in part, that in 1985, USOC received at least $75 million from a surplus estimated at between $150 and $225 million from the 1984 Summer Olympics in Los Angeles. Dolan, *Giant Olympic Surplus Spills Over Into Anger*, Los Angeles Times, November 1, 1984, pp. 1, 21-22; King, *Panel Begins Parcelling Out L.A. Games Surplus*, Los Angeles Times, December 10, 1985, p. 10; *The Olympic Surplus: Who Gets The Gold?*, Newsweek, November 26, 1984, p.48. USOC also received at least $68 million from the U.S. government in contributions to the 1984 Games. *Id., Los Angeles Times*, November 1, 1984. (Compare J.A. 189-190, where USOC represents in response to interrogatories that it has received only $16.3 million altogether from the U.S. government). Of record, SFA&A's small-scale and struggling financial situation is extant. In staying the enforcement of the $96,600. attorneys' fees award by USOC against SFA&A, one Circuit Judge had occasion to observe that SFA&A was in "dire financial straits". (J.A. 344). The record also establishes that petitioners claimed to have lost an "incalculable" amount, that included $43,118. in measurable destroyed property, because of the injunction issued against their use of "Olympic" in 1982. (J.A. 223-224). If it is USOC's purpose in going outside the record to suggest that SFA&A did not suffer losses by USOC's suit, or could easily sustain them, the record itself defeats that suggestion. If USOC is trying to imply that *it* has been harmed by SFA&A's use of "Olympic", it is noteworthy that USOC never pressed nor proved any claim for monetary damages against SFA&A. (P.Cert. App. 1 pp.2-3).

in this case. Petitioners' uses of "Olympic" in their literature, speech and paraphernalia were in repeated, obvious and unbroken conjunction with the term "Gay"; the few occasions in which there were references to the "Olympic" Headquarters and Committee for the Gay Olympic Games occurred in the inescapable context of literature about the Gay Olympic Games. The term "Olympic" used by petitioners never appeared in any document that did not also contain the word "Gay", and in almost every instance the word "Gay" appeared immediately beside the word "Olympic". (J.A. 352-353, 361, 402-404). Moreover, SFA&A never used any Olympic symbol, insignia, trademark or emblem protected by section 380 of the Amateur Sports Act, other than the words "Olympic", "Olympics", and "Olympiad". (J.A. 100 (including reference to three (3) disks, not rings), 115; R.17 at Ex.'s A-E, G-U, BB-DD, II, JJ).

In its effort to paint SFA&A's Gay Games as an apolitical replica of the Olympics, USOC simply leaves out the true colors of the Gay Games. USOC omits mention of each facet of the Gay Games that is distinctive, from the 1982 torch run from Stonewall in New York City, the reputed birthplace of the modern gay/lesbian rights movement (J.A. 98, 113, 355) to the recognizably non-Olympic sports included in the Gay Games, including billiards, bowling, rugby, softball and physique. (J.A. 100, 354). USOC omits all reference to the open criticism of and disassociation with USOC's Olympics in SFA&A's literature (See eg. R.17 at Ex. I). Most flagrantly misleading of all, USOC neglects any meaningful mention of the declaredly political and expressive purposes and means of the proposed "Gay Olympic Games", which pervade SFA&A's literature as well as the record below as to the motives of SFA&A's participants and volunteers. (J.A. 90-116, 349-350, 352-364).

USOC's attempt to rewrite the record in this case, apparently to create an image of SFA&A as a conscientious copier of the Olympics, undeserving of legal protection, is factually insupportable. If USOC makes this effort to

convince this Court that there is no triable dispute of material fact as to whether SFA&A's use of "Olympic" tended to cause confusion, mistake, deception or false association with USOC, that effort must fail as a matter of law. The U.S. Court of Appeals for the Ninth Circuit specifically determined that "[b]ecause confusion between USOC's and SFAA's use was a disputed question of fact, the summary judgment can be sustained only if the Act does not require confusion." (P.Cert. App.1, p.4).

II. THE CLARIFICATION AND CIVIL ENFORCEABILITY OF USOC'S TRADEMARKS WERE THE PURPOSE OF THE ENACTMENT OF SECTION 380 OF THE AMATEUR SPORTS ACT IN 1978.

USOC contends that if Congress did not give it more than a trademark, by enactment of section 380 of the Amateur Sports Act of 1978, Congress would have had no purpose in enacting that section 380. This is illogical. Congress need not have intended to grant USOC an unprecedented power to control virtually all uses of the word "Olympic" to have had a purpose in that enactment.

As to "Olympic", the obvious purpose of section 380 was to clarify and give civil enforceability to USOC's claimed trademark upon that word. That purpose is entirely borne out by the language, legislative history and thrust of section 380. Indeed, the purpose of section 380 insofar as the term "Olympic" is concerned is quite legally evident, when one considers the posture of USOC's claimed trademark upon "Olympic" without section 380. Despite whatever trademark registrations as to "Olympic" USOC made before 1978, USOC cannot have had an *enforceable* trademark on the word until section 380 was enacted. The reason for this is plain: as an obviously generic term, "Olympic" was not capable of being trademarked by USOC (or any other entity) under the Lanham Act, in that generic words cannot be trademarked under that statute. (P.Cert. 28-31). As this Court recently observed:

> "the Lanham Act allows a mark to be challenged at any time if it becomes generic, and, under certain circumstances, permits the non-trademark use of descriptive terms contained in an incontestable trademark."
> *Park 'N' Fly v. Dollar Park 'N' Fly*, 105 S.Ct. 658, 665 (1985); see also, *Anti-Monopoly Inc. v. General Mills Fun Group Inc.*, 684 F.2d 316 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983).

Thus, it is quite plain that Congress acted purposefully and consistently in the enactment of section 380, where the term "Olympic" is concerned. Congress bestowed a trademark upon USOC by that enactment that USOC otherwise, legally, did not have; the act empowered USOC to seek Lanham Act remedies for infringements. If USOC already was entitled to Lanham Act remedies as to "Olympic" before 1978, then Congress surely would not have specifically cited that statute in its enactment.

The factors that underscore the correctness of petitioners' position as to the meaning of section 380 are several and strong: Congress' citation to the Lanham Act, along with trademark (and not anti-dilution or other) terms of art, in construction of section 380; the legislative history of section 380 (Amicus Brief of Amateur Athletic Union et al., (below, "Am.AAU" 12-28); the absence of an enforceable trademark in USOC as to "Olympic" before the 1978 enactment, as discussed above. Even without weighing the constitutional constraints upon Congress in enacting section 380 relative to "Olympic", the statute in its language, history and trademark

law posture persuade that section 380 spells "trademark" as to USOC's rights in "Olympic".[2]

III. THE EVIDENCE OF CENSORSHIP OF SFA&A IS REAL; USOC'S ABBREVIATED READING OF THE FIRST AMENDMENT AS APPLIED TO SFA&A CANNOT BE CONSTITUTIONALLY SUSTAINED.

To belittle the free speech position of SFA&A before this Court, USOC argues that petitioners "seek to conjure a vision of shadowy censors snipping words from dictionaries, or of reporters or commentators gagged so they may not utter an offending term. Such fancy has nothing to do with this case." (R.Br. 12) This rhetoric by USOC fades dramatically when juxtaposed with the factual record at bar, which shows without contradiction that petitioners and all those associated with them were compelled by a court order literally and physically to excise a 2763-year old[3] generic and widely used word, not solely from thousands of posters, buttons and t-shirts, as well as SFA&A's literature, but from their vocabularies as to the Gay Games. (J.A. 88-116). The record further establishes that "Olympics" also literally was black-inked from at least one newspaper's coverage of the

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[2]To the extent that amicus AFL-CIO joins USOC in arguing that USOC's is the only permissible interpretation of section 380 (A. AFL-CIO p.7), petitioners respectfully point out, as a procedural consideration, that amicus AFL-CIO has no conceivable interest in this trademark law issue, and, on the merits, petitioners observe that the very passages of legislative history that AFL-CIO cites for its "inescapable" statutory interpretation (A. AFL-CIO p.7) have been cited by at least one U.S. District Court to mean that USOC's hold on "Olympic" is no greater than that necessary to prevent competing trademark registrants. *Stop The Olympic Prison v. USOC*, 489 F.Supp. 1112, 1118-1121 (S.D.N.Y. 1980) (indicating that the purpose of section 380 was "to prevent all persons other than USOC from registering the Olympic words and symbols as trademarks...rather than as a blanket prohibition of all uses whether commercial or not.").

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[3]*Oxford English Dictionary* (2-vol. ed. 1971) (P.Cert. 31-33).

Gay Games. (J.A. 88-89 and Ex. A thereof). The censor's hand reached out in this case, in the form of a selectively targeting lawsuit that imposed an injunction; this occurred in real life, and not in petitioners' "fancy". (Compare R.Br. 12 and J.A. 88-116).

Moreover, when SFA&A used the term "Olympic" in a news item about a so-called Winter "Olympics", and when petitioners' co-counsel Ms. McGreivy wore her hard-earned U.S. Olympic team sweatshirt to the opening ceremonies of the Gay Games and was photographed in it there, USOC yelled "contempt" of an injunction that it now pretends had no censorious effect. (J.A. 285, 288, 302-305, 308-310; R.97 at Ex.A). Petitioners' counsel wonder, if SFA&A's agents had elected to defy the injunction, and to engage in actual contempt of court by calling their Gay Games an "Olympics", whether the fines and jail sentences flowing from such defiance would be termed the "conjur[ing of] a vision" and the product of "fancy", by USOC.

The working model of First Amendment freedoms of speech and association in USOC's brief on the merits reflect a similarly revealing and ironically limited perspective on constitutional rights. USOC proposes a "Bill of Rights" as to uses of "Olympic" to be permitted by SFA&A that bears a remarkable lack of resemblance to the real scope of the First Amendment. (R.Br. 32). USOC's "Bill of Rights", permitting SFA&A to "criticize the Olympics" by means chosen by USOC, but obviously prohibiting SFA&A from using the means it chose itself (ie. holding a "Gay Olympic Games"), purports to decide what content and meaning the word "Olympic", and USOC's activities, shall have in SFA&A's vocabulary. That USOC arrogates to itself the power to prescribe what uses of "Olympic" of a political nature are permissible admits the central First Amendment contention of petitioners: USOC is brokering the content and meaning of protected speech, by claiming a right to control political and expressive uses of "Olympic". (P.Cert. App.3 pp.31-41).

Rejecting USOC's "Bill of Rights" in favor of the U.S.

Constitution's version, SFA&A contends that its right of free expression must be not one iota less expansive than the right of the sponsors of the "Special Olympics", the "Junior Olympics", the "International[4] Police Olympics", and the dozens of others whose "Olympics", celebrating activities from nudity to rat-races and from ballet to the human mind, are either explicitly blessed or tacitly condoned (to the same legal effect) by USOC. (J.A. 93). The rigid and discriminatory constraints of USOC's "Bill of Rights" where SFA&A's use of "Olympic" is concerned are utterly disharmonious with the boundaries of the real Bill of Rights. The federal constitutional guarantees of free speech and association, especially as strengthened by the equal protection guarantee's assurance of freedom from invidious discrimination by government in the distribution of those First Amendment rights, cannot be reconciled with USOC's crabbed and censorious version of these rights as applied to petitioners.

USOC's proferred defense of its prohibition of a "Gay Olympic Games" as a time, place and manner rule is absurd, in terms of this Court's decisions as to the meaning of this doctrine. The cases USOC cites that uphold certain governmental restrictions as reasonable time, place and manner rules, without exception, do not involve injunctions prohibiting the use of particular words. *City of Renton v. Playtime Theatres*, 106 S.Ct. 925, 932 (1986) (zoning ordinance that prohibited adult entertainment theatres within certain areas left 520 acres for that use); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45-46 (1983)(mailbox system in schools that excluded non-representing union from putting fliers in teachers' boxes was not a content-based restriction, and the school's internal mail system was not a traditional public forum); *Grayned v. City*

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[4]USOC's obfuscations as to its treatment of the "Police Olympics" (R.Br. 42 n.61) cannot hide the constitutionally crucial point that, since 1982, USOC has permitted the organizers of that annual international (J.A. 101 and Ex. Z thereto) athletic event freely to use "Olympic", while using the mighty arm of the law to prevent SFA&A from doing no more. (P.Br. 8-9)

of Rockford, 408 U.S. 105, 106-108 (1972) (ordinance prohibiting disorderly conduct was properly enforceable against black students who disturbed the peace). Because there is *no* time, place or manner in which SFA&A can hold a "Gay Olympic Games", these decisions are facially distinguishable from the case at bar.

In *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984), also cited by USOC in support of its time, place and manner analogy, a federal statute that prohibited photos of currency was found not to be a valid time, place and manner restriction, because, "[a] determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers." Likewise, in the case at bar, where USOC decides which popular, public interest "Olympics" are in the best interests of amateur athletics and/or USOC, and supports the "Special Olympics", "Junior Olympics" and "Explorer Olympics" (J.A. 33), permitting a variety of other "Olympics" to survive as well (J.A. 93, 97, 99, 105, 247-252, 310-311), while litigating to prevent the "Gay Olympic Games" from proceeding by that name, there are judgments imposed about the appropriateness of these various "Olympics" as surely as there was a judgment imposed as to the photos of money in *Regan v. Time, Inc.*, above.

Indeed, counsel for USOC admitted early in this litigation that a content-based judgment was made by USOC as to SFA&A's use of "Olympics", when he argued that "because this is an activity which directly competes with the Olympic Games", there was "harm" to USOC, and "[t]he fact that it is identified with homosexuals and the homosexual community makes that harm to us even greater"; the "harm" claimed by USOC was the implication that USOC discriminates against gay and lesbian persons, in that the " 'Gay Olympics' suggests very strongly that they have to do it because the Olympics

themselves are not available to gay people." (J.A. 53-54).[5] Documentation of explicitly anti-gay reasons for USOC's conduct (which evidence generally is rare, because parties infrequently admit their biased motives in writing) also has been adduced by SFA&A in this case. (J.A. 246-252). The instant case involves USOC's content-based, homophobic control of free speech and association, and not a neutral restriction upon the time, place or manner of communication.

IV. USOC'S EVASION OF THIS COURT'S DECISIONS AS TO STATE ACTION, BY MEANS OF A SERIAL DISCOUNTING OF THE SIGNIFICANCE OF EACH STATE ACTION FACTOR, IS UNCONVINCING: IT IS THE SUM-TOTAL OF THE FACTORS THAT IS SUPPOSED TO DETERMINE THE RESULT.

USOC and amicus AFL-CIO essentially argue that no single indicium of "state action" shown to be present at bar should convince this Court of the presence of "state action" on USOC's part. SFA&A readily agrees that even sizeable governmental funding by itself, or performance of a traditional public function by itself, or federal chartering of a corporation by itself, or the apparent existence of monopolistic control of a particular activity by a governmentally empowered entity by itself, or the exercise of a specific federally provided authority that enables an entity to discriminate and suppress free speech, by itself, necessarily constitutes "state action". At bar, however, none of these factors is by itself; all are present.

Weighed together, the factors indicating that USOC was engaged in state action in denying use of "Olympic" to SFA&A while permitting it to others similarly situated

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[5] In its answer to SFA&A's counterclaims, USOC admitted that its counsel had stated to a television news reporter that SFA&A was "not a group *suitable* for use of Olympic terminology and symbols because SFAA's program did not comply with the requirements and needs of [USOC]." (J.A. 178) (emphasis added).

establish, at least, that there should have been a trial as to "state action" below. The deprivation of a trial to SFA&A on the state action issue cannot be made to agree with the decisions of this Court as to how the presence of state action is to be detected, assuming *arguendo* that USOC cannot be held a state actor as a matter of law on the instant record.

USOC proposes to overcome the key difference between this case and *DeFrantz v. USOC*, 492 F.Supp. 1181 (D.D.C. 1980) by misstating SFA&A's argument as to *DeFrantz*. SFA&A argued not that this case is different from *DeFrantz* because this is a First Amendment case, but that this case is different from *DeFrantz* because this case is both a First Amendment and a discrimination case, presenting precisely the sort of discrimination claim found by the *DeFrantz* court to be absent there, thus precluding the application of discrimination law precedents on the state action issue in *DeFrantz*. (Compare P.Br. 29-30 and R.Br. 45 n.66).

USOC's avoidance of *Martin v. IOC*, No. CV 83-5847 (C.D.Cal. April 4, 1984) is no more persuasive than USOC's handling of *DeFrantz*. USOC argues to this Court that it was not found to be a state actor in *Martin*. (R.Br. 45-46 n.67). This argument is contradicted by the content of the *Martin* opinion. In *Martin*, the District Court clearly and expressly found that USOC, as well as the Los Angeles Olympic Organizing Committee, was engaged in state action, *Id.* slip opinion at pp. 18-20, and the U.S. Court of Appeals affirmed that state action finding as to both USOC and LAOOC. 740 F.2d 670, 677 (9th Cir. 1984). Furthermore, USOC squarely conceded this fact in its brief to the U.S. Court of Appeals in the present case, stating that, in *Martin*, the District Court had found that "... *USOC was involved in state action*...". (Brief of Appellees, p.29) (emphasis added).

In *Martin v. IOC*, the Court of Appeals held that the state action finding had been arrived at by a careful weighing of the facts below. In irreconcilable contrast, in the case at bar the Court of Appeals ignored the record multiplicity of factors pointing to "state action", allowing trial on this

constitutionally all-important issue to be foreclosed in favor of the District Court's conclusory determination that USOC was not a state actor because "[t]he only case to have dealt with this question expressly found that that doctrine did not" apply. (J.A. 271)

V. USOC'S DISCRIMINATORY AND SPEECH-INVADING ENFORCEMENT OF ITS TRADEMARK AS TO "OLYMPIC" AGAINST SFA&A AT MINIMUM RAISES DISPUTES OF MATERIAL FACT THAT SHOULD HAVE BEEN TRIED BELOW.

Citing one case in a footnote, USOC contends that this Court should ignore all of the record evidence of homophobic bias by USOC in its denial of use of "Olympic" to SFA&A, and in its bringing of a suit[6] and its securing of an injunction against SFA&A's use of "Olympic"[7], and should instead respect "[t]he District Court's finding that there was 'no "sinister cast"'" in USOC's conduct at bar. *Inwood Labs v. Ives Labs*, 456 U.S. 844, 852, 857-858. (1982)(R.Br. 42 n.60) That citation dies when exposed to the light of the

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[6]USOC speaks of SFA&A's claim of discrimination in violation of equal protection, based in part on USOC's bringing suit against SFA&A while permitting others to engage in like uses of "Olympic", and in part on USOC's securing an injunction against SFA&A alone, as if this were a novel sort of claim. (R.Br. 42-44). SFA&A's equal protection claim is actually very ordinary, consisting as it does, *inter alia*, of the allegation that USOC has "intentionally discriminated against gay and lesbian individuals...and organizations...by means including...denying permission to such persons and groups to use the word 'Olympic' while allowing use of the word 'Olympic' to other individuals and organizations similarly situated" and by securing an injunction that suppressed speech by SFA&A and no other comparable group. (J.A. 173-175) (See cases cited in P.Br. 34).

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[7]The granting of an injunction that inhibits free speech is obviously state action, and USOC's brief seems to admit as much. (R.Br. 43-44). But then USOC and amicus AFL-CIO confound the clear element of state action in the injunctions issued below by urging that, in asserting that USOC's use of the courts to secure such an injunction constitutes state action, SFA&A

instant procedural and substantive record.

In *Inwood Labs*, a trademark infringement action was tried as between a pharmaceutical manufacturer who had discontinued use of red and blue capsules for a drug and another manufacturer who had taken up this color scheme for this drug; after trial, the District Court made specific findings of innocent intent on the part of the second manufacturer. *Id.* In stunning contrast, in the case at bar, there was no trial and there were no findings of innocent intent (or any other intent) as to USOC; the District Court denied trial and found only that USOC was not a state actor. (J.A. 270-271). *Inwood Labs* cannot conceivably offer a basis for this Court to uphold the deprivation of a trial to SFA&A as to the issues of discrimination in USOC's assertion of its rights at bar.

USOC proposes to shore up its argument that it has equally, rationally and even-handedly enforced its mark as to "Olympic" with a footnote, purportedly summarizing its litigation as to "Olympic" since passage of section 380 (R.Br.

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has taken *Shelley v. Kraemer*, 334 U.S. 1 (1948), beyond its bounds. (R.Br. 44; A. AFL-CIO 18). Those arguments unnecessarily confuse and complicate SFA&A's position. SFA&A here simply contends that in granting an injunction against protected speech, the lower courts contributed state action to the paradigm, even assuming *arguendo* that USOC itself was not engaged in state action when it denied SFA&A use of the term "Olympic" while permitting others similarly situated to use it. That application of *Shelley* is not a widening in any respect, as USOC seems to concede. (R.Br. 43-44). Moreover, USOC's attempt to cast *Shelley* in moribund terms fails to take into account that *Shelley* established a clear precedent as to the nature of judicial actions as state action, which this Court recently and unanimously had occasion to underscore. *Palmore v. Sidote*, 104 S.Ct. 1879, 1881 n.1 (1984) (citing *Shelley v. Kraemer* for the proposition that "[t]he actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fifth Amendment".) Amicus AFL-CIO's contention, that petitioners cannot rely on this meaning of *Shelley* because their petition for certiorari did not raise the issue of state action as to the injunction, is mistaken. (P.Cert., "Questions Presented" 3 and 4, p.i-ii; pp. 25, 40-41, 42-46; App.8 thereof at p. 121).

41 n.58), and with the accompanying assertion, not supported by any evidence of record and contradicted by the cases in that footnote, that USOC's enforcement actions under section 380 have focussed on athletic contests, trade activities and solicitors of public donations. Study of the cases cited in USOC's footnote 58 show a significantly different picture than USOC draws, in which SFA&A stands virtually alone as a target of USOC litigation against non-profit entities and against holders of athletic contests.

First of all, USOC leaves out its litigation against SFA&A and the STOP group[8] from footnote 58. This omission seriously distorts the picture presented, by concealing the "political" litigation of USOC using section 380 against groups whose uses of "Olympic" have offended it for primarily non-commercial reasons.

Second, of the fifteen (15) cases USOC lists in the footnote, twelve (12) involve unambiguously profit-making commercial enterprises and activities, and the marketing of goods and services using Olympic symbols as well as the word "Olympic". None of these involve suits against stagers of athletic contests or solicitors of public donations outside commercial circles; thus, the bulk of USOC's litigation under section 380 has been pure commercial trademark enforcement.

Third, of the three (3) remaining cases in USOC's footnote 58, none involve an asserted political, expressive user of "Olympic" engaged in centrally non-commercial activity. One of the cases concerns a group claiming association with and support by USOC. *National Amateur Sports Foundation v. USOC* (D.D.C. 1980) (J.A. 392- 393). One involves mixed facts that include collaboration of a non-profit entity with a commercial one to market "Joe Weider Olympians" food supplements, using "Olympic" symbols as well as the word. *USOC v. International Federation of Body Builders*, 219 U.S.P.Q. 353 (D.D.C. 1982). The only case in the

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[8] *Stop The Olympic Prison v. USOC*, cited in n. 2, supra.

footnote that was a suit by USOC to enjoin a non-profit organization's contest using the word "Olympic" was brought by USOC *after* SFA&A claimed discriminatory enforcement of USOC's mark against it, in August 1982. *USOC v. March of Dimes Birth Defects Foundation* (J.A. 437).

USOC's footnote 58 cannot alter or diminish the surpassing importance of the unrebutted fact that SFA&A stands alone among those whose political and expressive uses of "Olympic", in essentially non-commercial circumstances, has been enjoined. SFA&A in behalf of gay persons has been silenced and suppressed in its "Gay Olympic Games", while police, Armenians, youth, disabled persons, Explorer scouts, seniors and a variety of others have not been silenced or suppressed. (J.A. 33, 93) These other groups have received USOC's open authorization, or its tacit permission, to stage and promote "Olympics", in conjunction with their discrete efforts to resist societal prejudice against them and to celebrate their groups' special qualities in "Olympic" contests of their own design; SFA&A has been singled out by USOC for prohibition of similar expressive and associative behavior.

The fact that USOC has sued more than a dozen commercial enterprises to prevent trade profits based on unconsented-to uses of "Olympic", and that it has brought a number of other actions to prevent trademark registrations of "Olympic" by commercial competitors, does not change the discriminated-against posture of SFA&A relative to police, children, nationality groups and others who have either been openly authorized by USOC, or at least permitted, to have "Olympics" without litigation or injunctions. Assuming *arguendo* that USOC has policed its mark equitably as among commercial infringers, that fact does not begin to estabiish an absence of discrimination against SFA&A. The record remains crystal-clear that, in denying consent as to "Olympic" to SFA&A, and then in suing and enjoining it, USOC has discriminated, by permitting an array

of other popular, public interest "Olympics" to flourish while the "Gay Olympic Games" is enjoined.

Nor can USOC's invocation of *Columbia Broadcasting System Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) efface the evidence of discrimination from the instant record, or obliterate its constitutional significance. *CBS* is plainly distinguishable in the issues decided there. In the *CBS* case, the central constitutional issues did not include whether CBS used litigation and the injunctive processes of courts to discriminate among political users of its medium; the central issue of *CBS*, rather, was whether CBS could preclude an entire class of advertisers (there, editorial-type ads) from its commercial airwaves. *Id.* at 128-129.

On the issues of state action and of the degree of judicial scrutiny that should confront governmentally authorized infringements of free speech, the *CBS* case supports SFA&A. In *CBS*, this Court distinguished *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), stating in pertinent part that:

> "...there Congress had expressly authorized the agency to undertake plenary intervention into the affairs of the carrier and it was pursuant to that authorization that the agency investigated the challenged policy [of radio broadcasts on public buses] ... and approved it on public interest standards."
>
> *Id.* at 119.

Here, like *Pollak* and unlike *CBS*, Congress specifically empowered USOC to exercise the control that resulted in the alleged infringement of rights. (See Am.MALDEF et al., p. 47). USOC's reliance upon *CBS* to undercut the state action and equal protection position of SFA&A is wholly misplaced.

VI. CONCLUSION

The case at bar does not present a commercial trademark infringer who is confronted with the ownership interest of the holder by way of litigation and injunction, by contrast to *USOC v. Intelicense Corp.*, 737 F.2d 263 (2d Cir. 1984), cert. denied, 469 U.S. 982 (1984); see also, *FTC v. A.P.W. Paper Co.*, 328 U.S. 193 (1946). Nor does it present a determination by a state government that, because of a history of unfair trade practices, an entire industry shall have to be deprived of the use of any trademarks in order to prevent deception of the public. *Friedman v. Rogers*, 440 U.S. 1 (1978). Nor, certainly, does the case at bar raise any issue as to the validity of myriad federal statutes bestowing certain protections on the Boy Scouts, American Legion or the like, nor does it question the validity of state anti-dilution laws. (See Am.AAU, pp. 29-49).

Instead, the case at bar is about a non-profit corporation that seeks to use a common, generic word in politically expressive ways, just as others similarly situated are permitted to do so. In a larger sense, perhaps, the case involves the use of the law either to enhance or restrict a set of free speech and associative interests in behalf of a contingent of the human rights movement. In this case, unlike *Intelicense, A.P.W. Paper* and *Friedman v. Rogers,* petitioners have been prohibited by an injunction from using a word that others use freely for similar purposes. Moreover, the injunction was acquired by an entity whose posture looks very like that of a state actor, under circumstances that show content-based restriction of speech and discriminatory motive on the part of the speech-suppressing agency.

These provocative and difficult constitutional issues need not be reached at bar. An interpretation of section 380 that holds that it bestowed no more than a trademark as to "Olympic" on USOC, to which normal trademark law principles, defenses and remedies apply, will avoid the bulk of these hard constitutional questions. If these issues must be reached, then surely SFA&A was entitled to a trial upon the

underlying factual questions as to state action, intent and purpose of the parties below. In any event, the injunction imposed below is constitutionally overbroad, even if SFA&A were a hardcore trademark infringer.[9]

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[9]Once again, USOC relies upon a main case (here, for the proposition that the injunction at bar was permissible) that does not support it. In *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947) (R.Br. 39 n.54), unfair competition as well as trademark infringement had been proved. In upholding the injunction there, this Court stated in relevant part "...where unfair competition is established, any doubts as to the adequacy of the relief are generally resolved against the transgressor." (citation omitted). Not only has no "unfair competition" by SFA&A been proved at bar, but USOC failed to litigate any such claims beyond its initial pleading. (P.Cert. at App.1, p.2). Furthermore, *Champion Spark Plug* was decided without the degree of regard for the First Amendment implications of injunctions against commercial speech that has been developed in subsequent decisions of this Court and the lower federal courts, upon which SFA&A's challenge to the injunction herein relies, assuming SFA&A's speech could be called "commercial", such as in *In re R.M.J.*, 455 U.S. 191 (1982)(P.Br. 36-37; P.Cert. 41-46).